TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1962

No. [redacted] 77

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1961
CERTIORARI GRANTED MARCH 5, 1962

Supreme Court of the United States

OCTOBER TERM, 1961

No. 766

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND, VIRGINIA

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPT. VIRGINIA STATE PENITENTIARY, RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM—Filed Feb. 2, 1961

To the Honorable Justice of the Aforesaid Court:

Before this Honorable Court comes now JOHN R. JONES, hereinafter referred to as "petitioner", who alleges and will show unto this Honorable Court that he is unlawfully held, imprisoned and restrained of his liberty at the Virginia State Penitentiary Farm, Goochland, Va., by M. L. Royster, Supt. of said farm, under order of W. K. Cunningham, Jr., Supt. of Virginia State Penitentiary, by reason of an illegal conviction and sentence resulting from a trial held in such a manner as to deny petitioner his rights under the Fourteenth Amendment to the Constitution of the United States which guarantees all persons due process of law and equal protection of the laws. Petitioner therefore prays that this Honorable Court will grant the Writ of Habeas Corpus herein requested.

[fol. 4] • • • •

[fol. 5] STATEMENT OF FACTS

1. Petitioner was tried on a charge of Larceny of Automobile in the Circuit Court of Chesterfield County, Virginia on the 8th day of July 1946, and upon entering an unassisted plea of guilty was convicted and sentenced to serve eighteen (18) months in the Virginia State Penitentiary. This was petitioners first felony conviction.

2. Petitioner was tried in the Richmond City Circuit Court on November 18, 1953 and sentenced to serve an additional ten (10) years as a repeater for having been three times convicted and sentenced to the Virginia State Penitentiary.

3. Petitioner was granted a writ of habeas corpus in November 1957. In the petition for writ of habeas corpus petitioner had attacked the validity of the above 1946 conviction on the grounds that he had been denied due process of law which is guaranteed to everyone under the Fourteenth Amendment to the Constitution of the United States. After two hearings being held on the above writ of habeas corpus (the first hearing was continued on motion of Attorney for Respondent when the presiding Judge made the statement that he thought the trial being contested was void) petitioner's petition was denied and dismissed August 27, 1959.

4. On December 23, 1959 petitioner filed a petition for a writ of habeas corpus with the Supreme Court of Appeals of Virginia, citing the same allegations as the petition in Circuit Court had contained. This petition was dismissed on April 20, 1960.

5. On May 6, 1960 petitioner filed a petition for writ of Certiorari with the United States Supreme Court. This petition was denied November 7, 1960.

6. Since petitioner has alleged a denial of Constitutional rights under the Fourteenth Amendment to the Constitution of the United States, this Court has jurisdiction to review and reverse the foregoing decisions.

7. Petitioner alleges that since the sentence received in Chesterfield County Circuit Court on July 8, 1946 is illegal, null and void, the ten (10) year sentence imposed in Richmond City Circuit Court, resting upon the aforesaid illegal sentence, is also null and void.

[fol. 6] PETITIONER'S ARGUMENT

Petitioner was tried in 1946 without the aid of counsel, without being offered the services of counsel and without being informed that he was entitled to such services. He at no time, orally or in writing, waived this right, in fact he was not even aware that the Court could appoint counsel to defend him and being only 20 years old and a private in the United States Army with no financial resources he could not afford to obtain counsel of his own choosing.

It has been argued by Counsel for Respondent that even though petitioner had no counsel, he was still given a fair trial. The very fact that petitioner was tried without counsel and without his having waived his constitutional right to same and *without the Court informing him of this right* constitutes an unfair trial. Honorable Justice Black of the United States Supreme Court said in an opinion in the case of *Herman* vs. *Claudy*, 350 U.S. 116 (1956) rendered on January 9, 1956: "Herman should have been told by the County Court of his right to a defense lawyer." It would appear to petitioner from these words that the Court had an obligation to inform the defendant of his right to Counsel. Counsel for Respondent has stated the Court did not deny petitioner to the right to counsel, this is true but the *Court failed to inform petitioner of this right* and therefore effectively deprived him of the opportunity to take advantage of this right. A defendant cannot take advantage of any right that he is unaware even exists.

Counsel for Respondent has argued to back up his contentions that petitioner had a "fair trial" is the fact that petitioner only received an eighteen months sentence when he could have received a maximum of ten years. This is the same as saying that anyone charged with a crime who did not receive the maximum punishment provided by law had automatically received a "fair trial" as evidenced by his receiving less than the maximum sentence, even though he may be entirely innocent of the crime he is charged with.

As shown by exhibit (F), petitioner was also denied equal protection of the laws, which is guaranteed every-

one under the Fourteenth Amendment to the Constitution of the United States, said amendment being ratified by the State of Virginia October 8, 1869. As can be seen from this certified court order, the Circuit Court of Princess Anne County, Virginia held that Samuel I. Forsythe was denied due process of law at his trial of September 5, 1945 because the Court did not appoint him counsel and he had not waived this right. This decision was allowed [fol. 7] to stand without being appealed by the State, and yet when petitioner presented identical allegations, with proofs of such allegations, his claims are denied with the statement that he was not denied due process of law. This certainly is not equal protection of the laws.

Petitioner also contends that the Supreme Court of Appeals of Virginia could not have given him full consideration on his petition, as the state had removed part of the transcript taken at the hearing held in Chesterfield Circuit Court before submitting it to the said Court in answer to petitioner's petition. Petitioner has never received a full copy of this transcript and therefore could not submit it in his own behalf.

The excerpts submitted by the Attorney for Respondent contained only testimony favorable to Respondents cause thereby prejudicing petitioner's chances for a full and favorable hearing by the Supreme Court of Appeals of Virginia. Petitioner protested against the filing of only part of the transcript without submitting it in whole. This protest was ignored by the Supreme Court of Appeals of Virginia. How was it possible for them to reach a fair and just decision when they were only confronted with testimony favorable to Respondent? Petitioner cites this contention in anticipation of the Respondent arguing that this Court need not consider this petition under the decision of *Lee* v. *Smyth*, 262 F. 2d 53, 54 (1958). As Justice Sobeloff said in the case of *Holly* v. *Smyth* (decided June 3, 1960 in the U.S. Court of Appeals for the Fourth Circuit) "If the rule were read as broadly as the State suggests, it would mean that a Federal Court would practically never consider habeas corpus petitions from state prisoners. moreover, the rule of *Brown* v. *Allen*, 344 U.S. 443, 465 (1953) relates only to the necessity for

factual inquiries; it in no way relaxes the duty of the District Court to make its own Constitutional determination." The case of *Stonebreaker* v. *Smyth*, 163 F. 2d 498, 502 (4th Cir., 1947) was also cited by Justice Sobeloff in the above case as being an excellent opinion involving an inexperienced 20 year old youth.

The above *Brown* v. *Allen* rule requires the state courts to give full and fair consideration to petitions before it is applicable. Petitioner contends that this rule was not met by the State Supreme Court of Appeals when it reached a decision on his petition after reviewing only the portions of the lower Court transcript that were favorable to Respondent, without having the full transcript for its consideration.

[fol. 8] In answer to each petition filed by petitioner, Counsel for Respondent has included petitioner's criminal record stating that it was for "informational purposes". What possible informational purposes can a criminal record, that has occurred since the trial being contested took place, serve except to tend to prejudice the Court against petitioner?

Counsel for Respondent has alleged that petitioner had prior criminal experience and therefore did not need a lawyer, yet the above referred to records refute this allegation and show that petitioner had never been in a Court of Record before the contested 1946 trial.

Counsel for Respondent has alleged that petitioner was familiar with legal procedure because he had appeared in juvenile court at the age of 14 years. As anyone who has any knowledge of Courts is aware, juvenile proceedings are in no way similar to the proceedings in a Court of Record.

At the time of petitioner's trial in 1946 he was charged by the State with two (2) counts of Auto theft and by the Federal Courts with one (1) charge of inter-state transportation of a stolen automobile. At a conference held just prior to the trial, at the request of the prosecuting attorney, with an F. B. I. Agent, the aforesaid prosecuting attorney and petitioner present, it was agreed that petitioner would plead guilty to the state charges and the Federal charges would be dropped. At no time before,

during or after this conference did petitioner have the advice of an attorney. Petitioner alleges this was a form of coercion by the Prosecuting Attorney to obtain a guilty plea.

Petitioner was tried for Larceny of Automobile, which was a felony. In 1946 Virginia had a statute (Va. Code 1919 Sec. 4480—1950 Sec. 18-236)* dealing with unauthorized use of an auto which was only a misdemeanor. Petitioner cites this and alleges that an attorney in his behalf could possibly have brought out facts at his trial making this statute more applicable to petitioner than the more serious one of larceny of auto.

The U. S. Supreme Court ruled on January 9, 1956 that [fol. 9] persons incarcerated in flagrant violation of their constitutional rights have a remedy. Petitioner does not have a transcript of this opinion but can quote from the newspaper article which appeared in the Richmond News Leader, Richmond, Va., on January 10, 1956.

> "The Supreme Court says persons sentenced to state prisons in "flagrant violation" of their constitutional rights may challange their convictions regardless of the passage of years.
>
> The High Tribunal ruled unanimously yesterday that a Penn. prisoner sentenced 10 years ago on burglary, larceny and forgery charges is now entitled to a habeas corpus hearing on his complaint of violation of constitutional rights. The ruling was in favor of Stephen J. Herman, who was sentenced to 17½ to 35 years imprisonment by a Washington County, Pa. court after he pleaded guilty to the charges.

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* Va Code Sec. 4480 (1919) 18-236 (1950)—UNAUTHORIZED USE OF AUTOMOBILES OR OTHER MOTOR VEHICLES: Any person who, without the consent of the owner, shall take, or cause to be taken, an automobile, or motor vehicle, and operate or drive, or cause same to be operated or driven for his own private use or purpose, shall be deemed guilty of a misdemeanor.

HERMAN'S COMPLAINT

Herman's complaint was that he was not told of his right to have a lawyer defend him in the County Court.

Justice Black, author of the Supreme Court's opinion, said Herman should have been told by the County Court of his right to a defense lawyer. Black added that the number and complexity of the charges against Herman "create the strong conviction that no layman could have understood the accusation".

"Nor was Herman barred from presenting his challange to the conviction because eight years had passed before the action was commenced", Black stated. He also said "men incarcerated in flagrant violation of their constitutional rights have a remedy".

In ordering the habeas corpus hearing in the County Court, Black said that if Herman can now prove his charges of violation of constitutional rights he will be entitled to "relief". This could mean Herman's release from prison.

The foregoing is a word for word duplication as it appeared in the newspaper, with quotations and punctuations as they appeared.

In *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947) the Court gave a concluding summary at page 665. "Here a seventeen-year-old defendant, confronted by a serious and complicated criminal charge, was hurried through unfamiliar legal proceedings without a word being said in his defense. At no time was assistance of counsel offered or mentioned to him, nor was he appraised of the consequences of his plea. Under the holdings of this Court, petitioner was deprived of rights essential to a fair hearing under the Federal Constitution".

Counsel for Respondent has stated that the records of the Supreme Court of Appeals of Virginia do not disclose that petitioner made any attempt to perfect an appeal to that Court from the decision handed down in Chesterfield County Circuit Court. As shown by exhibit (G) petitioner was informed by the Clerk of Court of

Chesterfield County that it would be necessary for petitioner to pay a fee of ten (10) dollars before an appeal could be effected from that Court. As Respondent is aware, petitioner has had to file a paupers oath asking permission of the various Courts to file his petitions in [fol. 10] Forma Pauperis, therefore, he is also aware that it was impossible for petitioner to perfect an appeal from the decision of the Chesterfield County Court. Petitioner proved to the Supreme Court of Appeals of Virginia that he could not perfect the above mentioned appeal and was forced to petition for a habeas corpus which was accepted by said Court. It would have been to petitioner's best interests had he been able to perfect said appeal as the Supreme Court of Appeals would then have had the full transcript to consider in reaching its decision instead of the carefully edited excerpts as submitted by Counsel for Respondent.

Petitioner has had to draw up all necessary papers to the best of his ability without the aid of an attorney, he therefore respectfully requests this Court to accept this petition in the manner and form in which it is drawn.

In view of the facts set forth in this petition and the allegations backed by Court decisions heretofore cited, this Honorable Court is requested in the name of Justice to grant petitioner a writ of Habeas Corpus in order that this Court may determine whether or not petitioner should have and is entitled to the relief denied him by the State Courts.

I will forever pray:

Respectfully submitted this 5th day of December 1960.

/s/ John R. Jones
JOHN R. JONES
Petitioner

Duly Sworn to by John R. Jones
Jurat Omitted in Printing

[fols. 11-43] * * * *

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted]

RETURN—Filed March 1, 1961

Now comes the respondent, by counsel, and, in conformity with the order of this Court of February 2, 1961, files this Return and says:

1. The petitioner is presently detained pursuant to a judgment of the Circuit Court of the City of Richmond of November 18, 1953, wherein petitioner was ordered to serve an additional term of ten years in the penitentiary as a third time offender. (See Exhibit I—Certificate of Curtis R. Mann, Director, Bureau of Records and Criminal Identification).

2. Petitioner's 1946 conviction in the Circuit Court of Chesterfield County on a charge of larceny of an automobile forms part of the basis for the petitioner's recidivist conviction of November 18, 1953.

3. Petitioner was not represented at his trial on July 8, 1946, at which time he plead guilty to a charge of larceny of an automobile, which is a non-capital felony.

4. Petitioner was accorded a hearing in the Circuit Court of Chesterfield County, Virginia on February 28, 1958 (A copy of the transcript of that proceeding is attached hereto and marked Exhibit II).

[fol. 45] 5. His petition was dismissed on August 27, 1958, (see Exhibit III—Certified Copy of Court Order).

6. The fact that petitioner was not represented by an attorney at his 1946 trial on an uncomplicated, non-capital charge does not of itself constitute "special circumstances" or a denial of constitutional rights. Petitioner had had previous court experience prior to 1946.

7. An examination of the transcript of the habeas corpus hearing in the said court reveals that petitioner was not denied any of his constitutional rights at his trial on July 8, 1946.

8. Petitioner has failed to show that any of his constitutional rights were denied him at his trial in the Circuit Court of Chesterfield County on July 8, 1946.

WHEREFORE, respondent prays that the petition for a writ of habeas corpus be dismissed.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary

By: /s/ Reno S. Harp, III
Counsel

Reno S. Harp, III
Assistant Attorney General
Supreme Court—State Library Building
Richmond 19, Virginia

Duly Sworn to by Reno S. Harp, III
Jurat Omitted in Printing

[fols. 46-80] * * * *

[fol. 81] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted]

ORDER DIRECTING FILING OF PETITION AND RETURN—
Feb. 2, 1961

Petitioner having filed an application for writ of habeas corpus, accompanied by an affidavit of poverty as provided by law, it is

ORDERED that said petition for writ of habeas corpus be filed without requiring said petitioner to pay the fees as prescribed by law or giving security therefor.

It is further ORDERED that said application for writ of habeas corpus be entertained by this Court, and the respondent, W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, do make return indicating under what lawful authority said petitioner is now being held in custody, and it is further

ORDERED that upon the filing of said return on or before March 1, 1961, the Court will then determine whether a plenary hearing is necessary to ascertain the legality of petitioner's detention. Brown v. Allen, 344 U.S. 443, 460, 461. Without limiting the nature of the return so filed, the Court is essentially interested in the following issues: [fol. 82] (1) Was petitioner represented by counsel or did he intelligently waive such right to counsel?

(2) If petitioner was not represented by counsel, did petitioner have a right to counsel under the "special circumstances" doctrine of youthful defendants, without previous experience in criminal cases, faced with complex legal issues? Wade v. Mayo, 334 U.S. 672; Holly v. Smyth, 280 F. 2d. 536.

(3) Was the petitioner ever accorded a plenary hearing by any state or federal court on his application for relief by way of habeas corpus?

Respondent is directed to file copies of any pertinent court records relating to the above questions.

The Court is not interested in petitioner's contention, based on the allegation that "it was agreed that petitioner would plead guilty to the state charges and the federal charges would be dropped", that his plea of guilty was coerced.

The Clerk of this Court will mail certified copies of this order to the petitioner and to the Attorney General of Virginia.

/s/ Oren E. Lewis

United States District Judge

Richmond, Virginia

February 2, 1961

[fol. 83] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

C.A. 3236-M

JOHN R. JONES

v.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary

ORDER AND OPINION—March 29, 1961

A petition for writ of habeas corpus, by John R. Jones, was filed, in forma pauperis, with this Court. Respondent has filed an answer, with exhibits attached thereto, as required by order of the Court.

On July 8, 1946, petitioner was convicted on his plea of guilty and was given a sentence of eighteen months by the Circuit Court of Chesterfield County, Virginia, on a charge of larceny of an automobile. On November 18, 1953, petitioner, as a third time offender, was given a ten year sentence under the recidivist statute, by the Circuit Court of the City of Richmond, Virginia. Petitioner is now in custody under authority of this sentence.

In attacking the validity of this sentence, petitioner contends that the 1946 conviction is void and, therefore, the present sentence is void. Petitioner alleges that at the 1946 trial he was not represented by counsel, that he did not waive counsel, that the Court did not inquire if he wanted counsel. Petitioner contends that because he was not represented by counsel, nor informed of his right to have counsel, he was denied due process of law under [fol. 84] the Fourteenth Amendment to the Federal Constitution and, therefore, the 1946 conviction is void.

It appears to the Court that petitioner alleged the same contentions in a petition for writ of habeas corpus filed in the state court. Petitioner was afforded a plenary

hearing by the Circuit Court of Chesterfield County, Virginia, on February 28, 1958. It is clear from a reading of the transcript of the hearing that the same issues raised in the petition pending before this Court were raised at that hearing and were determined by order of the Circuit Court of Chesterfield County, Virginia, entered August 27, 1959. Another petition for writ of habeas corpus, alleging the same contentions, was denied by the Supreme Court of Appeals of Virginia and petition for writ of certiorari was denied by the Supreme Court of the United States. The state court having considered petitioner's same allegations and having determined the factual and legal issues, it is not necessary for this Court to consider petitioner's petition for writ of habeas corpus. Brown v. Allen, 344 U.S. 443 (1953); Lee v. Smyth, 262 F. 2d 53 (4 Cir. 1958); Holly v. Smyth, 280 F. 2d 536 (4 Cir. 1960).

It further appears to the Court that petitioner has failed to show that special circumstances, necessitating his representation by counsel, were present at his trial on a noncapital offense in 1946. Betts v. Brady, 316 U.S. 455 (1942); Lee v. Smyth, 262 F. 2d 53 (4 Cir. 1958); Holly v. Smyth, 280 F. 2d 536 (4 Cir. 1960).

It also appears to the Court that petitioner's allegations relating to a coerced plea of guilty are insufficient.

[fol. 85] It is, therefore, ORDERED that the prayer of the petition for writ of habeas corpus be and the same is hereby denied, and the said petition be and the same is hereby dismissed.

The Clerk is directed to mail certified copies of this order to the petitioner, the respondent and the Attorney General of Virginia.

/s/ Oren E. Lewis

United States District Judge

Richmond, Virginia
March 29, 1961

[fol. 86] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted]

NOTICE OF APPEAL—Filed April 5, 1961

To the Honorable United States District Judge
Oren E. Lewis:

Please be advised that I wish to appeal the decision of Your Court in the above styled case, dated March 29, 1961, to the U.S. Court of Appeals for the Fourth Circuit. I hereby attest that I am a citizen of the United States and make this request under Title 28, U.S. Code Section 1915. Attached hereto is a Forma Pauperis oath under which I request this appeal be allowed to proceed. I respectfully request Your Honor to grant a Certificate of Probable Cause as provided under 28 U.S.C.A. 2253.

The grounds for this request are based on the following facts:

1. Petitioner was not provided a full and fair consideration of his allegations in the Supreme Court of Appeals of Virginia. The said Court reached its decision without having the full transcript of the lower Court proceedings before it, even worse, their decision was reached when they were aware that they only had a carefully edited portion of this transcript as submitted by Respondent. Even if the parts of the transcript that were removed by the Attorney for Respondent, before submitting it to the Court, were not of a nature as to be a deciding factor in reaching a decision, petitioner contends his rights were prejudiced by the said Court not demanding a full and complete transcript. They have never seen a full copy of the transcript so how could they determine whether the missing pages were important to the issue or not? [fol. 87] 2. Petitioner was inexperienced in criminal procedure and was not advised of his right to Counsel. Petitioner was 20 years old at the time of the contested

trial and without the aid of counsel. *Herman* v. *Claudy*, 350 U.S. 116 (1956) cites a similar trial involving a 21 year old defendant. Had petitioner been accorded his right to the aid of counsel; counsel might have been successful in getting the felony charges reduced to Unauthorized Use of an Automobile which would have fit the circumstances of the case much better.

Respectfully submitted this 4th day of April 1961.

/s/ John R. Jones
JOHN R. JONES
Petitioner

FORMA PAUPERIS PETITION

STATE OF VIRGINIA)
COUNTY OF GOOCHLAND) To-wit:—

This is to certify that I, John R. Jones, the undersigned, am destitute and without funds to pay the costs of this action; that I own no property, personal or real. It is respectfully requested that I be permitted to prosecute this action in Forma Pauperis as provided under Title 28, Section 1915 of the U.S. Code. The amount of money in my spend account at the Virginia State Penitentiary Farm is 55c.

/s/ John R. Jones
JOHN R. JONES
Petitioner

Subscribed and sworn to before me, a Notary Public in and for the County of Goochland and State of Virginia this 4th day of April 1961.

My commission expires: June 17, 1964.

/s/ R. M. Oliver
R. M. OLIVER
Notary Public

[fol. 88] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted]

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR A CERTIFICATE OF PROBABLE CAUSE—April 6, 1961

Upon consideration of petitioner's notice of appeal, filed April 5, 1961, to the order of this Court entered March 29, 1961, denying petitioner's petition for writ of habeas corpus, and petitioner's motion to proceed in forma pauperis in perfecting his appeal to the United States Court of Appeals for the Fourth Circuit; it is

ORDERED that the motion to proceed in forma pauperis be, and the same is hereby, denied.

The Court being of the opinion that no substantial question is presented for appeal, it is further

ORDERED that the certificate of probable cause, required for appeal under Title 28, U.S.C., Section 2253, be, and it hereby is, denied.

The Clerk of this Court is directed to mail copies of this order to the petitioner, the respondent, and the Attorney General for the State of Virginia.

/s/ Oren E. Lewis
United States District Judge

Richmond, Virginia
April 6, 1961

[fols. 89-91] * * * *

[fol. 92] PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8356

JOHN R. JONES, APPELLANT

versus

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

DOCKET ENTRIES

April 14, 1961, record on appeal filed and appeal docketed.

April 14, 1961, forma pauperis petition filed.

April 14, 1961, order granting certificate of probable cause, and granting appellant leave to proceed in forma pauperis, filed.

April 14, 1961, order assigning F. D. G. Ribble and Daniel J. Meador as counsel to present the appeal of John R. Jones, fixing time for filing of briefs and appendices, and directing Clerk to transmit the record on appeal to counsel for the appellant, filed.

Memo. of Clerk: Copies of these papers follow:

[fols. 93-96] * * * *

[fol. 97] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

To: F. D. G. Ribble
Daniel J. Meador
Counsel for the Appellant

NOTICE OF MOTION TO DISMISS—Filed June 22, 1961

Please take notice that on June 22, 1961, the Appellee, by counsel, in conformity with his letter to counsel for the Appellant of June 16, 1961, will file the original of the attached Motion to Dismiss in the Clerk's Office of the United States Court of Appeals for the Fourth Circuit at Asheville, North Carolina, and will move for the dismissal of the appeal when this case is called for argument.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary

By: Reno S. Harp, III
Counsel

Reno S. Harp, III
Assistant Attorney General
Supreme Court Building
Richmond 19, Virginia

CERTIFICATE

I certify that I delievered a copy of the foregoing Notice to counsel of record for the Appellant herein on this the 22d day of June, 1961.

Reno S. Harp, III
RENO S. HARP, III
Assistant Attorney General

[fol. 98] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

MOTION TO DISMISS—Filed June 22, 1961

Now comes the appellee, by counsel, and moves the Court to dismiss this appeal for the following reasons:

1. John R. Jones, the appellant herein, has accepted the terms of parole as specified in a parole agreement signed by him, a photostatic copy of which is attached hereto and marked Exhibit I.

2. John R. Jones, the appellant herein, will be released from custody on June 26, 1961, and will go to Lafayette, Georgia, where he will live with his Aunt and Uncle. He will be supervised by the Georgia Parole authorities in conformity with the Uniform Act for Out-of-State Parolee Supervision.

3. After June 26, 1961, the appellee herein, W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, will exercise absolutely no control over the appellant, John R. Jones, for the reason that the appellant will no longer be in the custody of the appellee.

4. This Court will be without jurisdiction to adjudicate this case after June 26, 1961, for the reason that the appellant will no longer be in the custody of the appellee, and the cause will then be moot.

[fol. 99] Wherefore, appellee prays that this appeal be dismissed from the docket of this Court.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary

By: Reno S. Harp, III
Counsel

Reno S. Harp, III
Assistant Attorney General
Supreme Court Building
Richmond 19, Virginia

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 100] EXHIBIT "1" TO MOTION

VIRGINIA PAROLE BOARD

ORDER OF RELEASE AND CONDITIONS OF PAROLE

To John R. Jones, No. 62545

In accordance with Title 53, Chapter 11, Code of Virginia, you have been granted parole, subject to the following parole conditions, and if accepted, your release from State Farm is directed on June 26, 1961.

You are placed under the custody and control of the Virginia Parole Board. The Parole Board may at any time extend your period of parole. YOU WILL REMAIN UNDER SUPERVISION UNTIL YOU RECEIVE THE FINAL ORDER OF DISCHARGE FROM THE PAROLE BOARD.

Your minimum date of release from supervision is March 30, 1964.

It is the order of the Parole Board that you shall comply with the following general and special conditions of parole. The general conditions are as follows: (a) Refrain from the violation of any penal laws and ordinances. (b) Live a clean, honest, and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your Parole Officer at once. (f) Do not leave or remain away from the community where you reside without permission of your Parole Officer. You shall not change your residence without the permission of your Parole Officer. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) You shall not own or operate a motor vehicle until you have received the written permission of your Parole Officer. (i) You shall not be permitted to own or have in your possession any legal firearms at any time while on parole, except with the written permission of your Parole Officer. (j) Submit in writing, once a month, a report on forms as prescribed by the Parole Board unless excused by your Officer. (k) Permit your Parole Officer to visit

your home and place of employment at any time. (1) Follow the Parole Officer's instructions and advice. The law gives him authority to instruct and advise you regarding your activities.

The special conditions ordered by the Parole Board are:

Home: Mr. and Mrs. J. N. McKinney, 701 McLemore Street, LaFayette, Georgia (Uncle and Aunt)
Employment: Mr. J. N. McKinney, 701 McLemore Street, LaFayette, Georgia (Plumber)

You are hereby advised that under the law the Parole Board may at any time revoke or modify any conditions of this parole. You shall be subject to arrest, for cause, upon order of the Parole Board or without order, for cause, by the Parole Officer. At any time within the period of your parole or within the maximum period for which you might originally have been sentenced for the offense for which you were convicted, the Parole Board may, if it sees fit, for cause, have you returned to the institution from which you were released to serve the unserved portion of your sentence of any part thereof.

You will proceed immediately upon your release by the most direct route and report as follows:

In person to Mr. Frank Clayton, Parole Supervisor, Chatsworth, Georgia.

The Parole Board has released you on parole because it believes that you will be sincere in your efforts to live up to the above conditions and thus benefit yourself as well as the community.

BY DIRECTION OF THE VIRGINIA PAROLE BOARD

/s/ R. E. Wilkins
Member, Virginia Parole Board

I agree that in the event I am arrested in any state or jurisdiction of the United States or any of its possessions for violation of this parole or for the commission of another offense, I will waive extradition and will return voluntarily to the state of Virginia.

I have read and/or had explained to me the above and by signature or mark below acknowledge receipt of this parole and agree to the conditions set forth.

/s/ John R. Jones
Parolee

Copies: Parolee, Parole Officer, Parole Board, Institution

[fol. 101]

IN THE UNITED STATES COURT OF APPEALS

DOCKET ENTRIES

June 23, 1961, (June Term, 1961) cause came on to be heard on the motion of appellee to dismiss and on the merits before Sobeloff, Chief Judge, and Haynsworth and Boreman, Circuit Judges, and was argued by counsel and submitted.

June 30, 1961, memorandum of law on behalf of appellee filed.

July 3, 1961, memorandum for appellant in opposition to appellee's motion to dismiss filed.

July 3, 1961, motion of appellant to add parties respondent filed.

July 7, 1961, reply memorandum of law on behalf of appellee filed.

Memo. of Clerk: The motion to add parties respondent follows:

[fol. 102] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

MOTION TO ADD PARTIES RESPONDENT—Filed July 3, 1961

1. Appellee moves the court for an order making parties respondent to the petition for habeas corpus and appellees in this case the following persons, members of the Virginia Parole Board:

Charles P. Chew
Ralph E. Wilkins
James W. Phillips

The address of each is 429 S. Belvidere Street, Richmond 20, Virginia.

2. By virtue of an order of the Virginia Parole Board effective June 26, 1961, the above named persons, constituting the Virginia Parole Board, now have custody of the appellant John R. Jones.

F. D. G. Ribble
Daniel J. Meador
Counsel for Appellant

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 103]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8356

JOHN R. JONES, APPELLANT

versus

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond
OREN R. LEWIS, District Judge

OPINION—Sept. 14, 1961

(Argued June 23, 1961)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

F. D. G. Ribble and Daniel J. Meador (court-assigned counsel) for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Frederick T. Gray, Attorney General of Virginia, on brief) for Appellee.

[fol. 104] HAYNSWORTH, Circuit Judge:

This petition for a writ of habeas corpus must be dismissed, for the prisoner is now at large on parole. He is no longer in the custody of the defendant, the Superintendent of the Virginia State Penitentiary, where he had been confined. While indirectly under their supervision, he is not in the physical custody of the members of the Virginia Parole Board, whom the petitioner would substitute as parties defendant, nor of any of their subordinates.

Jones, serving a sentence as a recidivist in Virginia sought his release by attacking one of the underlying convictions. The underlying conviction was imposed upon

a plea of guilty, but Jones alleges that he was without the assistance of counsel and was not told of and did not know that he had any right to counsel.

After exhaustion of his state remedies, Jones sought a writ of habeas corpus in the District Court. On appeal from a denial of his petition there, we appointed distinguished counsel to represent him.[1] They have ably presented his contentions, (1) that there were special circumstances which made his conviction without the assistance of counsel fundamentally unfair within the rule of Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, and (2) if the circumstances were not special, nevertheless, either Betts v. Brady has been overruled by Griffin v. Illinois, 351 U.S. 12, or that this court should anticipate the possibility that the Supreme Court, given an appropriate occasion, will overrule Betts v. Brady.

[fol. 105] In the meanwhile, Jones became eligible for parole. He signed a parole agreement which provided that he would reside with an uncle and aunt in LaFayette, Georgia, be employed by the uncle as a plumber and report promptly after his release to a Georgia Parole Supervisor at Chatsworth, Georgia.[2] He was then released. It is assumed that he then left Virginia and is now living and working in Georgia.

In the nature of things, the "Great Writ" of *habeas corpus ad subjiciendum* may issue only when the applicant is in the actual, physical custody of the person to whom the writ is directed.[3] The court may not order one to produce the body of another who is at liberty and whose arrest would be unlawful. The great purpose of the writ is to afford a means for speedily testing the legality of a present, physical detention of a person. It serves no other purpose.[4]

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[1] The Dean of the Law School of the University of Virginia and another member of the faculty of that school.

[2] Supervision by parole officials of Georgia had been arranged under the provisions of the Uniform Act for Out-of-State Parolee Supervision.

[3] See, generally, III Blackstone's Commentaries, 129, et seq. (1 Ed. 1768).

[4] See Heflin v. United States, 358 U.S. 415, 421, 79 S. Ct. 451, 3 L.Ed. 2d 407 (concurring opinion).

It was in recognition of the nature of the writ and its limitations that the Supreme Court held the writ unavailable to a Naval officer under orders to confine himself to the City of Washington[5] or to persons charged with crime, but at large on bail,[6] or to one confined in [fol. 106] prison under a sentence other than the one he seeks to attack.[7] It thus appears that some restraint upon a person's liberty is not necessarily the equivalent of the physical detention which is a requisite of the writ.

The Supreme Court has considered a case identical to that before us. In Weber v. Squier, 315 U.S. 810, 62 S.Ct. 800, 86 L.Ed. 1209, a petition for a writ of certiorari by an applicant for habeas corpus was denied on the stated ground that the cause was moot, the petitioner having been paroled and being no longer in the warden's custody.

Our inquiry would end with Weber v. Squier were it not for the fact that the question, though never since precisely before the Supreme Court, has a subsequent history in that court which brings into focus the question presented by the motion before us to substitute as parties defendant the members of Virginia's Parole Board.

In Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed. 2d 393, the Supreme Court said that a proceeding under 28 USCA § 2255 was not rendered moot by the expiration of the term of the sentence and the fact the petitioner, at the time of the hearing, was unconditionally at large. In saying so, it referred in summary fashion to the earlier cases of Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196, and United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248, though in the proceedings involved in those cases there was no custody requirement.

Fiswick, an alien, sought to overturn his conviction by a direct appeal. It was that proceeding which came

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[5] Wales v. Whitney, 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 277.

[6] Johnson v. Hoy, 227 U.S. 245, 33 S.Ct. 240, 57 L.Ed. 497; Stallings v. Splain, 253 U.S. 339, 40 S.Ct. 537, 64 L.Ed. 940.

[7] McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238; Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed. 2d 407.

[fol. 107] before the Supreme Court on certiorari. Meanwhile, he fully served his term and was released. It was held that the cause was not rendered moot because the conviction subjected him to deportation in the event the crime was found to be one involving moral turpitude.

Such proceedings on direct review of a conviction were never thought to involve the custody requirements of habeas corpus.

Morgan received in a state court a longer sentence than otherwise would have been imposed because of an earlier federal sentence which had been fully served. He sought a writ of *coram nobis* to review the federal court conviction. A majority of the court held that writ available under those circumstances. The decision in Morgan supports the conclusion that the custody requirement implicit in habeas corpus is not essential in coram nobis, but it does not suggest that the custody requirement may be disregarded in habeas corpus or in a proceeding under § 2255.

In Pollard, there was no reference to the custody requirement of § 2255 which, by its terms, is made available to a "prisoner in custody under sentence * * * claiming the right to be released * * *." The brief reference to the Fiswick and Morgan cases suggests the court then thought a § 2255 proceeding comparable in these respects to direct review and coram nobis proceedings.

Of course if Pollard is authoritative, if a former federal prisoner whose term is fully served can obtain review of his conviction under § 2255, a parolee whose term has not yet expired is entitled to the same relief. The Court of Appeals for the Ninth Circuit, relying on Pollard, so held [fol. 108] in two cases.[*] Indeed, that court allowed habeas corpus, for it recognized no difference in the custody requirement of habeas corpus and § 2255.

The Supreme Court then decided Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed. 2d 407, in which it held the custody requirement of § 2255 comparable to that of habeas corpus. A prisoner serving the first of three

[*] Dickson v. Castle, 9 Cir., 244 F.2d 665; Egan v. Teets, 9 Cir., 251 F.2d 571.

consecutive sentences was held to be without standing to question, under § 2255, the legality of the third sentence which he had not then begun to serve. The Court followed its earlier decision in a habeas corpus case involving similar circumstances. McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238.

The situation was clarified and Pollard laid to rest by Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed. 2d 963. Parker fully served the term of his Texas sentence while fruitlessly seeking in state and federal courts a hearing on his contention that the sentence was illegal. A majority of the court, per curiam, dismissed the habeas corpus case on the ground that Parker's release made it moot. It explained Pollard as having gone off upon an "unconsidered assumption" that § 2255 relief was available to one not in custody contrary to the later decision, after full consideration, in Heflin. It relied upon and followed Weber v. Squier.

In his dissenting opinion, the Chief Justice recognized that this case was indistinguishable from Pollard. He thought Pollard and Heflin reconcilable, and he sought to explain Weber v. Squier on the limited ground that the [fol. 109] parolee was no longer in the custody of the warden, the only official then before the court, leaving open the question of whether the parolee was still in the custody of some other official.

Clearly, however, the majority in Parker v. Ellis did not accept the minority's explanation of Weber v. Squier. The majority did not expressly overrule Pollard, though the two cases seem plainly inconsistent, for it thought Pollard already overruled by Heflin.[9]

We, of course, must follow the majority in Parker v. Ellis. We accept Weber v. Squier, as it did, as meaning a parolee is not in such custody as is required for habeas corpus. We find nothing of substance left in Pollard in the light of the subsequent decisions in Heflin and Parker v. Ellis.

With the exception of the two cases in the Ninth Circuit following Pollard,[9] the Courts of Appeals have consist-

[9] See footnote 8, supra. In neither of those cases was it held that a parolee is in custody. In each, as in Pollard, the custody requirement was unmentioned.

ently held that a paroled state prisoner is not in such custody as to permit him to seek a writ of habeas corpus in the federal courts.[10] The Ninth Circuit, in the same year in which, relying upon Pollard, it decided Egan v. [fol. 110] Teets,[11] emphatically held in a different context that one on parole is not in custody.[12] Seven of the Courts of Appeals have reached that conclusion. There is no dissenter among them. All agree that, if custody is a requirement of the writ, a state parolee cannot qualify.

Of particular importance in this case, involving a Virginia parolee, is the decision of this court in Whiting v. Chew, 4 Cir., 273 F.2d 885. There, a Virginia parolee, confined in Ohio, sought a writ of habeas corpus directed to the Director of the Virginia Parole Board for the purpose of removing a detainer filed by the Virginia Parole Board with Ohio prison officials. We held habeas corpus unavailable because the petitioner was not in the actual or constructive custody of Virginia's parole official.

We adhere to that decision. This petitioner, living with his uncle in Georgia and working there is not in such custody of Virginia's parole or prison officials as to support a writ of habeas corpus directed to them.

One subsidiary question remains to be mentioned.

It is contended that the petitioner is in the custody of Virginia's Parole Board because Virginia's statute says he is. Section 53-264 of Virginia's code provides that its prison official shall release "into the custody of the Parole Board" any prisoner subject to parole when ordered to do so by the Parole Board. It is not clear that this is not a procedural provision to obtain the prisoner's release from all custody, but for present purposes we may assume that

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[10] United States *ex rel.* St. John v. Cummings, 2 Cir., 233 F.2d 187; Adams v. Hiatt, 3 Cir., 173 F.2d 896; Whiting v. Chew, 4 Cir., 273 F.2d 885; Van Meter v. Sanford, 5 Cir., 99 F.2d 511; Siercovich v. McDonald, 5 Cir., 193 F.2d 118; Factor v. Fox, 6 Cir., 175 F.2d 626; Johnson v. Eckle, 6 Cir., 269 F.2d 836; Weber v. Hunter, 10 Cir., 137 F.2d 926.

[11] See Footnote 8, supra.

[12] Strand v. Schmittroth, 9 Cir., 251 F.2d 590.

[fol. 111] Virginia would interpret it to be comparable to the provisions of 18 USCA § 4203, applicable to Federal parolees.[13]

Addressing itself to a different problem, the Supreme Court said in Anderson v. Corall, 263 U.S. 193, 44 S.Ct. 43, 68 L.Ed. 247:

> "* * * The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is in legal effect imprisonment."

Thereafter, Judge Learned Hand said in a dictum,[14] "it is conceivable" that a federal parolee might have a right to have his conviction reviewed by habeas corpus because the statute said he was in custody. One such parol actually realized what Judge Hand thought conceivable. Because of the provisions of 18 USCA § 4203, the Court of Appeals for the Second Circuit held that the proceeding to review the conviction of a federal prisoner did not become moot when he was paroled.[15]

Respectfully, we disagree. It is not the labels a statute attaches but the substantive relationships it creates which are of importance. Whether or not Virginia's statute pro- [fol. 112] vides a hypothetical custody of her Parole Board, the fact is that the petitioner is lawfully at large in Georgia. From time to time, he must report to a Georgia parole officer and he should not change his residence or his employment without the prior or subsequent approval of that officer. Otherwise, he is as free as any other citizen to do as he pleases and go where he pleases.

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[13] 18 USCA § 4203 provides that a federal parolee is "in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced."

[14] United States v. Bradford, 2 Cir., 194 F.2d 197.

[15] United States v. Brilliant, 2 Cir., 274 F.2d 618.

His status is predominantly one of liberty. If he should commit a crime, his parole may be revoked, but any other citizen would be subject to arrest for the same offense. The overriding point is that Virginia's Parole Board cannot revoke his parole or compel his return to Virginia unless the parolee, himself, commits an act which would subject any citizen to arrest and confinement or ignores the other minimal terms of his parole.

Unquestionably, he is under some duty and restraint inapplicable to other citizens, but, as unquestionably, absent a violation of the terms of his parole, Virginia's Parole Board has neither the right nor the power to produce his body in the District Court for the Eastern District of Virginia. By his own volition, Jones could appear in the court in Virginia, and his consent is essential to the production of his body there.

To attach significance to a declaration of custody which, at best, is highly technical, hypothetical and insubstantial,[16] would prefer empty labels to a realistic appraisal of actualities. This we need not do. What formal declarations a state elects to incorporate in her statutes, if they do not affect substantive rights and relations, should not, and do not, control the availability of the writ of habeas corpus in [fol. 113] the federal courts. If the declaration creates a technical custody, it is not the kind of custody which is an essential of habeas corpus.

Since the petitioner is no longer in custody, this habeas corpus proceeding is moot.

Appeal dismissed.

SOBELOFF, Chief Judge, concurring:

The assumption that on completing a prison sentence, or being paroled, a person has no further interest to contest his record of conviction is contrary to common experience. Society, as our every-day observation confirms, visits upon such persons its strong disfavor, often involving hardship not less severe than imprisonment,

[16] See Van Meter v. Sanford, 5 Cir., 99 F.2d 511; Factor v. Fox, 6 Cir., 175 F.2d 626.

itself. Where the conviction was obtained by due process these collateral consequences, though unfortunate, cannot be redressed by law. But where constitutional rights have been violated there should be standing to attack a conviction even though the crime has been "paid for." Particularly is this true where the necessary steps for relief—technical, complicated and challenging to the most astute lawyers—are so time consuming that the prison term runs out before the process is completed.

The instant case, however, presents stronger grounds for allowing such attack than where "mere" social and economic prejudices will be brought to bear on an "ex-con." Here, not only is Jones still under some restriction, but he remains subject to recommitment to serve out his unexpired term in the event of parole violation, even if the breach is a minor one. This fact, it seems to me, makes our case logically indistinguishable on the issue of justiciability from *Fiswick* v. *United States*, 329 U.S. 211 (1946) [fol. 114] and, on the issue of standing to maintain a collateral attack, from *United States* v. *Morgan*, 346 U.S. 502 (1954) and *Pollard* v. *United States*, 352 U.S. 354 (1957).

In all fairness, the right to prosecute the appeal should not be lost in the instant case because, after unavoidably extended proceedings in state and federal courts, the prisoner's parole was announced to the court on the morning the appeal was scheduled for hearing. Because the time lag between initiation and final disposition of habeas corpus proceedings will so often make the remedy illusory, I would not be disposed to accept without question a state's right to bar the vindication of constitutional rights by granting a parole. One should not be made to bear the continuing burden of a constitutionally void conviction merely because the period of actual confinement having ended, no remedy can undo the unjust commitment. This is no reason to withhold the benefit of the remedy's prospective operation.

It would be difficult to explain why the statutory fiction of constructive custody over a parolee may not be availed of to supply the custody made prerequisite by section 2254 or section 2255. Nevertheless, debate on this point

seems to be foreclosed by the Supreme Court's recent decision in *Parker* v. *Ellis*, 362 U.S. 574 (1960), which held that a state prisoner's petition for habeas corpus became moot when his sentence expired. Although this is not a direct holding that a parolee is similarly without standing, we are bound to recognize that, despite intervening decisions, the per curiam opinion in *Parker* v. *Ellis* has restored the authority of *Weber* v. *Squier*, 315 U.S. 810 (1942) which, as pointed out by Judge Haynsworth, is here controlling.

On this basis I concur in the dismissal of the appeal.

[fol. 115] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8356

JOHN R. JONES, APPELLANT

vs.

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary, APPELLEE

JUDGMENT—September 14, 1961

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the motion of the appellee to dismiss the appeal and on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby, dismissed with costs.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

October 13, 1961, mandate withheld, at direction of Chief Judge, pending application for a writ of certiorari.

[fol. 116] • • • •

[fol. 117] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 118]

SUPREME COURT OF THE UNITED STATES

No. 660 Misc., October Term, 1961

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 5, 1962

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the question of "mootness". The case is transferred to the appellate docket as No. 766 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1962 636626 124